Supreme Court, U.S.
FILED
JAN 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2035

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ADAMS FRUIT COMPANY, INC.,

Petitioner,

v.

RAMSFORD BARRETT, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

BONITA L. KNEELAND
Counsel of Record
JOHN W. ROBINSON
GEORGE A. VAKA
Fowler, White, Gillen, Boggs, Villareal & Banker, P.A.
501 East Kennedy Boulevard
Suite 1700
Tampa, Florida 33602
(813) 228-7411

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR THE PETITIONER:	
I. The Court Of Appeals Failed To Give Proper Deference To The Department Of Labor's Contemporaneous Interpretation Of AWPA	3
II. The Pre-1982 Legislative History Is Not Relevant To This Case And Does Not Support Respondents' Position In Any Event	15
III. Respondents' Position Is Contrary To All Accepted Notions Of How Injured Workers Should Be Compensated	18
CONCLUSION	20

TABLE OF AUTHORITIES

CASES: PAGE

Chevron U.S.A. v. *Natural Resources Defense Council*, 467 U.S. 837 (1984) 3, 4, 5, 15

Container Corp. v. *Franchise Tax Board*, 463 U.S. 159 (1983) 15

De La Fuente v. *Stokely-Van Camp, Inc.*, 713 F.2d 225 (7th Cir. 1983) 11

Mead Corp. v. *Tilley*, 109 S. Ct. (1989) 15

NLRB v. *Food & Commercial Workers*, 484 U.S. 112 (1987) 4, 5

Roman v. *Sunny Slope Farms, Inc.*, 827 F.2d 1116 (4th Cir.), cert. denied, 484 U.S. 855 9

Salazar-Calderon v. *Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985), cert. denied, 475 U.S. 1035 (1986) 11

Streeter v. *Sullivan*, 509 So. 2d 269 (1987) 7

STATUTES:

Farm Labor Contractor Registration Act ("FLCRA") (repealed) ..... *passim*

Migrant and Seasonal Agricultural Workers Protection Act ("AWPA"), 29 U.S.C. § 1801, *et seq.* ..... *passim*

Fla. Stat. § 440.11 7

Tex. Civ. Stat. Art. 8306, § 26 7

OTHER AUTHORITIES:

120 Cong. Rec.
35,470 (1974) 10
35,900 (1974) 10

126 Cong. Rec.
H 6979 (daily ed. Sept. 14, 1982) 10
H 10456 (daily ed. Dec. 20, 1982) 8, 9, 10
26,008-26,010 (1982) 9, 10, 17
32,458-32,466 (1982) 9, 16, 17

48 Fed. Reg.
15,803 (1983) 13
15,805 (1983) 12
15,806-15,827 13
36,736 (1983) 13

H. Doc. 93-380 (1974) 10

Hearings Before the Subcomm. on Econ. Opportunity of the House Comm. on Educ. and Labor on H.R. 8232 [and Related Bills], 95th Cong., 2d Sess. (1978) 17

Hearing on the Migrant and Seasonal Worker Protection Act, 97th Cong., 2d Sess. (1982) ... *passim*

H.R. 10631, 95th Cong., 2d Sess. (1978) 17

H.R. Rep. 93-1493, 93rd Cong., 2d Sess. (1974) . 10, 11

H.R. Rep. 97-885, 97th Cong., 2d Sess. (1982) . 4

A. Larson, THE LAW OF WORKMEN'S COMPENSATION (1989) 3, 11, 19

S. Rep. 93-1295, 93rd Cong., 2d Sess. (1974) .. 10, 11

REPLY BRIEF FOR THE PETITIONER

Respondents and their *amici* attempt to obscure the simple nature of this case by characterizing our claim as one of "reverse pre-emption" (Resp. Br. 14) that would require federal courts to apply a "bewildering array of state workers' compensation laws." (*Id.* at 44.) They portray the private right of action for personal injuries as the "centerpiece" (*id.* at 1) of AWPA, and claim that the Department of Labor's regulation, if upheld, would "eliminate the private enforcement mechanism of § 1854." (*Id.* at 32.) To paraphrase respondents (*id.* at 19), the oft-repeated "crux of [their] entire argument" is that pre-1982 legislative history demonstrates that the Department of Labor's interpretation was "anathema to Congress" (*id.* at 25) and that the regulation improperly attempts to "engraft into Congress' statute * * * the precise workers' compensation exclusivity defense * * * [that] Congress *specifically rejected*" in 1978. *Id.* at 15, 25, 27-28, 29. None of these assertions can endure close scrutiny.

To begin with, pre-emption ("reverse" or otherwise) is not the central issue in this case. This case instead is about statutory construction and deference to administrative agency interpretation. The court of appeals, affording absolutely no deference to the Department of Labor's regulation, improperly struck down the perfectly reasonable, contemporaneous interpretation by the administrative agency that drafted the statute and that Congress charged with its implementation. The regulation is simple in operation, has been on the books for nearly seven years without causing the parade of horribles respondents' hypothesize, and does not depend at all in its operation on the exclusive remedy provisions of state law.

In addition, the regulation does not "gut" enforcement of AWPA; rather it places an entirely sensible limitation, expressly contemplated by Congress, on one of the ways

in which the statute is to be enforced. The language and structure of the statute, the legislative history, and years of experience under both AWPA and FLCRA all make a mockery of respondents' claim that Congress intended to create a private federal tort action for personal injuries as the "centerpiece" of either law. Such private tort actions have *not* been a significant element of AWPA enforcement and were not a significant element of FLCRA enforcement. To the contrary, we are unable to locate *any* reported decisions under FLCRA involving private actions by farm employees for personal injury damages, and this is apparently only the second such case reported under AWPA. Surely, if respondents' federal tort action was central to enforcement of both laws, one would expect many more reported decisions. And if the Department of Labor's 1983 regulation devastated the centerpiece of the statute, as respondents claim, it would have been challenged long ago.

Furthermore, there is nothing to the argument that the Department of Labor's regulation is precluded by Congress's rejection of an amendment to an earlier statute in 1978. Even if the legislative history of FLCRA were relevant to the interpretation of the entirely new statutory structure of AWPA, the 1978 amendment proposed to do *exactly* what Congress did when it enacted AWPA in 1982. The amendment would have relieved agricultural employers of the obligation to carry duplicative liability insurance when transporting workers covered by workers' compensation. That proposal—rejected in 1978 because of the lack of a dependable employer-employee relationship in the labor contractor business and *not* because workers' compensation exclusivity was "anathema" to Congress—became law under AWPA in 1982. Under the circumstances, the 1978 legislative history, if anything, provides additional reason to defer to the Department of Labor's sensible interpretation of AWPA.

As the country's leading authority on workers' compensation observed in the course of his harsh criticism of the court of appeals' decision, "[i]t is difficult to believe that Congress meant to [give migrant workers] rights superior to all other workers." 2A A. Larson, THE LAW OF WORKMEN'S COMPENSATION 27 (1989 Supp.). It is far easier to accept the interpretation of the statute suggested by Section 1841(c) and rendered at the time the statute was enacted by the agency that sponsored and drafted the law and was charged by Congress with its implementation: that migrant workers be placed on an equal footing with other employees and be prohibited from suing their employers for damages for job-related injuries covered by workers' compensation.

Respondents' sweeping argument, if accepted, would give migrant workers a shallow victory indeed. The workers in this case would win the right to sue for their injuries under AWPA, but countless more workers would stand to lose their far more valuable workers' compensation coverage and their right to automatic compensation without proof of fault. If respondents prevail, farm employers in states where workers' compensation is elective will have little incentive to provide coverage, and farm groups in other states would certainly pressure their legislatures to repeal mandatory coverage. Thus a valued benefit will be lost to farmworkers (and not merely to those involved in motor vehicle accidents) and a major purpose of AWPA—to promote workers' compensation coverage—will have failed.

I. The Court Of Appeals Failed To Give Proper Deference To The Department Of Labor's Contemporaneous Interpretation Of AWPA

A. As respondents acknowledge (Resp. Br. 28), analysis of this case must begin with *Chevron U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984), and the

Court's more recent decision on deference to administrative agency interpretation, *NLRB* v. *Food & Commercial Workers*, 484 U.S. 112 (1987). The first step is to determine whether congressional intent is "clear" and "unambiguous" on the "precise question at issue." *Chevron*, 467 U.S. at 843 n.9.

Contrary to respondents' assertion, it is far from clear that Congress intended to place migrant workers in a better position than other employees by allowing them to sue their employers for damages for on-the-job personal injuries when those injuries were covered by workers' compensation. What evidence there is strongly points in the opposite direction: Section 1841(c) exempts employers from the statute's vehicle insurance requirements if workers are transported only under circumstances where they are covered by workers' compensation, and the only congressional report on the bill assured farmers that no additional insurance would be necessary under such circumstances. H.R. Rep. 97-885, 97th Cong., 2d Sess. 20 (1982) (hereinafter, "*House Report*").

Respondents would have this Court believe that Congress told agricultural employers that they need not bother to carry additional insurance to cover accidents *just like the one seen in this case*, but that they would still be subject to extraordinary liability under circumstances where other employers would be covered by workers' compensation. There is no evidence that Congress intended such a trap for unwary employers. The intent of Congress on the issue is *at least* unclear; in fact, it seems to clearly favor the interpretation given by the Department of Labor.

B. In these circumstances, the Department of Labor's contemporaneous interpretation is entitled to deference "as long as its interpretation is rational and consistent with the statute." *NLRB* v. *Food & Commercial Workers*,

484 U.S. at 123. The Court will "also consider the consistency with which an agency interpretation has been applied, and whether the interpretation was contemporaneous with the enactment of the statute being construed." *Id.* at 124 n.20.

Respondents raise several points in their attempt to prove that the regulation is inconsistent with AWPA. First they claim that *Chevron* requires that there be an express delegation of authority to the Secretary and an identifiable "gap" to fill before the agency can issue any interpretative regulations. Resp. Br. 30. The full passage from *Chevron* that respondents selectively quote from belies those notions (467 U.S. at 843-844; emphasis added to portion deleted by respondents):

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. *Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of the agency.*

But even if *Chevron* did require express delegation of authority and an explicit gap in every case, this case would meet those criteria. The gap to be filled is the answer to the question on which congressional intent is unclear: whether Congress intended to permit personal injury suits by workers injured on the job and covered by workers' compensation. And the delegation to the Secretary could hardly have been more clearly expressed. See 29 U.S.C. §§ 1841(a)(2), 1841(d), 1861.

Respondents would have the Court believe that neither Section 1861 (which gives the Secretary of Labor full au-

thority to issue rules and regulations to carry out the entire statute) nor Section 1841 (which *requires* the Secretary to promptly issue regulations implementing the motor vehicle safety and insurance provisions of AWPA) authorizes any regulation that would restrict in any manner the private right of action under Section 1854. Resp. Br. 31-34. But Section 1861 expressly grants the Secretary broad authority to issue regulations governing the entire statute.

Furthermore, respondents' argument carefully ignores the nature of the claims they have brought against petitioner. The claims that are at issue here are all claims under Section 1841, which governs motor vehicle safety, and not merely insurance as respondents imply. Respondents alleged that petitioner transported them in an unsafe motor vehicle *in violation of Section 1841(b)*. J.A. 7. Their private action under Section 1854 is thus a claim under Section 1841(b). Sections 1841(b) and (d) expressly require the Secretary to issue regulations governing motor vehicle safety claims. Section 1841(b) mandates that in issuing such regulations, the Secretary consider any "undue burden" the rules might impose on farm employers. The Department of Labor regulation at issue in this case certainly comes well within the Secretary's express regulatory authority. And it clearly would impose an "undue burden" on farm employers to leave them exposed to personal injury suits under circumstances where other employers would be completely covered by workers' compensation.

Moreover, the statute expressly authorizes regulations "to protect the health and safety of migrant and seasonal workers." 29 U.S.C. § 1841(b)(2)(A). Implicit in both Section 1841(c) and the regulation is the determination that the health and safety of such workers would best be protected by affording them the protection given other employees: the no-fault, immediate recovery system of workers' compensation. The law and the regulation give farm employers a powerful incentive to elect workers' compensation coverage where it is elective. And they reduce farm opposition to state legislative changes making coverage available to migrant workers.[1] A holding that would permit farmworkers to sue for personal injuries that are covered by workers' compensation would reverse those beneficial incentives. Farm employers would gain little or nothing by electing to maintain workers' compensation coverage, and state legislatures would inevitably respond to pressure from the farm lobby to exclude workers covered by AWPA from mandatory workers' compensation coverage.[2]

C. Respondents also contend that the regulation is inconsistent with AWPA because it would "eliminate the private enforcement mechanism of § 1854" and would be "tantamount to an assertion that Congress put a not entirely-reformed fox [the Department of Labor] in complete charge of the henhouse." Resp. Br. 32. Thus respondents strike a theme that they repeat throughout their brief: that the private right of action is the "centerpiece" of AWPA, that it was a critical part of the bill because the Department of Labor could not be trusted to enforce AWPA, and that the regulation guts the private right of action.[3] None of these points are correct.

---

[1] Indeed, in 1984 the Texas legislature responded to AWPA by amending its workers' compensation law to cover migrant and seasonal workers. Tex. Civ. Stat. Art. 8306, § 25; Acts 1984, 68th Leg., 2d C.S., p. 562, ch. 33, § 2.

[2] The Florida legislature has been very quick to react to any judicial erosion of the exclusivity rule in that state. For example, in *Streeter* v. *Sullivan*, 509 So. 2d 289 (1987), the Florida Supreme Court held that plaintiffs could circumvent the exclusive remedy rule by suing corporate officers of their employers on a gross negligence theory. Within months, the legislature amended the Workers' Compensation law to eliminate that tactic. Fla. Stat. § 440.11 (1988).

[3] In support of that theme, respondents state that "AWPA's private right of action was enacted in the face of stiff opposition from agricultural employers." Resp. Br. 17. That is a flagrant distortion; the major employer groups all supported AWPA. The citation respondents give for this point relates only to the earlier, far different statute (FLCRA), and not to AWPA.

1. To begin with, in portraying congressional distrust of the Department of Labor as a critical factor in the passage of AWPA (and as a factor that cuts against the regulation), respondents ignore both the nature of the bill and the nature of that distrust. AWPA was an *Administration Bill*, drafted, negotiated and lobbied for *by the Department of Labor*. *House Report* at 20; *Hearing on the Migrant and Seasonal Worker Protection Act*, 97th Cong., 2d Sess. 43-50 (1982) (hereinafter "*1982 Hearings*"). All of the snippets of (mostly pre-1982) legislative history respondents cite do not negate the fact that "[o]n September 1, 1982, the Secretary of Labor transmitted [the bill] to Congress," that it was referred to Committee and formally introduced and "sponsored" later that month, and that *the Department of Labor's bill* was subsequently passed without amendment. *House Report* at 20-21. To argue that the "centerpiece" of the Department of Labor's own bill was the private right of action because the statute reflected a strong distrust of the Department of Labor ignores the fact that this was a bill *proposed and drafted by the Department of Labor*.

The frustration with the Department of Labor that led directly to AWPA was not primarily over its failure to enforce the statute for the benefit of workers, but instead over its *overzealous enforcement* of technicalities against employers and particularly its imposition on fixed-situs farmers of requirements intended and appropriate only for labor contractors. In fact, in late 1979, 52 Senators signed onto a letter harshly critical of the Department and proposing an amendment to FLCRA that would completely exempt fixed-situs farmers and producers from the statute. The following year, such a bill passed the Senate but did not come to a vote in the House. See *1982 Hearings* at 44-45, 59. AWPA was a reaction to that frustration. Other than a statement by Rep. Ford three months after AWPA was passed in the House (126 Cong. Rec.

H 10456 (daily ed. Dec. 20, 1982)), there is absolutely no indication that anyone at the time thought that the private right of action was in any sense the critical portion of AWPA.

2. Moreover, no fair-minded reading of the statute and its legislative history would support respondents' claim that the private right of action in general, or more particularly any right of action for personal injuries, was the "centerpiece" of AWPA. In setting out the "five basic principles" encompassed by the Act (*1982 Hearings* at 45), the Administration spokesman did not even mention the private right of action. The hearings, congressional reports and floor speeches centered around the need to distinguish between fixed-situs agricultural employers and labor contractors and between migrant and seasonal workers, and the need to end abusive treatment of farm employers. The primary focus of the statute itself and its history was on disreputable employers (most particularly farm labor contractors) who cheated workers out of their wages or enticed them to work with false promises. Even in the brief specific discussions of the private right of action, primary emphasis was placed on statutory damages ($500 per plaintiff per violation), primarily for wage payment, housing and recordkeeping violations. See *House Report* at 1-12; *1982 Hearings* at 43-56; 126 Cong. Rec. 26,008-26,010; 126 Cong. Rec. 32,458-32,466.[4]

Respondents' assertion that the private right of action was the "centerpiece" of the law is supported only by

[4] Respondents' claim that a private right of action for personal injuries is essential to the Act is also disproved by experience. Of the scores of reported cases under Section 1854 and its FLCRA predecessor, only two—this case and *Roman* v. *Sunny Slope Farms, Inc.*, 817 F.2d 1116 (4th Cir.), cert. denied, 484 U.S. 855 (1987)—involved personal injury claims. *Roman*, of course, held that an employee covered by workers' compensation could not sue his employer under AWPA for job-related injuries.

a statement by Rep. Ford made three months after the House passed the bill. 126 Cong. Rec. H 10456 (daily ed. Dec. 20, 1982). But the Department of Labor, not Rep. Ford drafted the bill; Rep. Ford was not among the original sponsors of the bill in the House (see 126 Cong. Rec. H 6979 (daily ed. Sept. 14, 1988)); and the cited speech shows that Rep. Ford did not believe the private right of action in the bill went far enough. *Ibid.* Rep. Ford did not even attend the hearings on AWPA (see *1982 Hearings* at 1) and did not speak during the debate when the bill was passed. See 126 Cong. Rec. 26,008-26,010. *Ibid.* His after-the-fact statement is hardly a persuasive bit of legislative history. Moreover, when the private right of action was added to the predecessor statute (FLCRA) in 1974, the House version—as to which Rep. Ford *was* the lead sponsor—would have only permitted suits for statutory damages up to $500, and *not* suits for actual damages. 120 Cong. Rec. 35,470 (Oct. 16, 1974). Although the 1974 legislative history is not relevant to AWPA, it is interesting to note that what respondents claim was the "centerpiece" of that statute (the right to sue for actual damages) was added to the bill at the very last minute and without explanation. See 120 Cong. Rec. 35,470 (Oct. 11, 1974) (favorable final vote on House version of bill permitting suits only for statutory damages up to $500); 120 Cong. Rec. 35,900 (Oct. 16, 1974) (final Senate vote purportedly accepting the House version but adding the "actual damages" language without explanation).[5]

[5] The version passed by the Senate on October 16, 1974, was vetoed by the President later that month because of its inclusion of some unrelated amendments to the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"). See H. Doc. 93-380 (veto message). The bill was reintroduced in virtually identical form (except for the deletion of the LHWCA provisions) and was passed by both houses later that fall. See H.R. Rep. 93-1493, 93rd Cong., 2d Sess. 3 (1974); S. Rep. 93-1295, 93rd Cong., 2d Sess. 5 (1974).

(Footnote continued on following page)

3. Most critically, it is not at all true that the Department of Labor's regulation would "eliminate" or even significantly impair the private right of action under Section 1854. The regulation applies to only one small category of cases—those involving personal injuries caused by AWPA violations.[6] And even in that category of cases, the regulation does not preclude a private action based on the alleged underlying AWPA violations. Workers in those cases would have the right to bring the same action that they regularly bring against employers claiming safety, wage payment or recordkeeping violations. The regulation only bars an additional recovery under AWPA for bodily injuries. In that regard, the district court might have gone too far in dismissing all of respondents' claims relating to the motor vehicle accident.

Respondents' dire predictions simply do not reflect reality. AWPA enforcement has not collapsed in the nearly seven

[5] *continued*
Neither the House Report nor the Senate Report on the bill that eventually became law even mentioned the "actual damages" language; both characterized the private right of action as simply allowing the award of statutory damages up to $500 for each violation. H.R. Rep. 93-1493 at 11; S. Rep. 93-1295 at 10. To accept respondents' position the Court thus must believe that neither chamber felt it necessary to even mention the "centerpiece" of the statute!

[6] Respondents make much of the fact that Section 1854 only provides a private right of action for *intentional* violations of AWPA and that state law exclusivity provisions do not apply to intentional violations. Resp. Br. 40, 43 & nn.40-41, 44. But they fail to mention that under AWPA, a violation is regarded as "intentional" whenever the underlying act or omission is "conscious or deliberate"; an intent to violate the act is not required. See, e.g., *Salazar-Calderon* v. *Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1345 (5th Cir. 1985), cert. denied, ; U.S. 1035 (1986); *De La Fuente* v. *Stokely-Van Camp, Inc.*, 713 F.2d 225, 238 (7th Cir. 1983). The exclusive remedy provisions of workers' compensation laws do not apply only when it is shown that the employer had an actual intent to injure the employee. See 2A A. Larson, THE LAW OF WORKMEN'S COMPENSATION § 68.13.

years the regulation has been in effect. Moreover, personal injury claims against farm employers were not significant elements of private actions even under the previous statutory structure, FLCRA, where there was no similar regulation. In fact, we have been unable to locate even a single reported decision under FLCRA involving such a claim.

Rather than pursuing claims that are at the core of AWPA enforcement, respondents are attempting to break new ground not envisioned by Congress and certainly not necessary for the effective enforcement of the statute. Farmworkers continue to vigorously augment the Department of Labor's enforcement of AWPA through private actions for statutory damages, injunctive relief and other equitable relief. But farmworkers are not placed in the inequitable and unsupportable position of being able to sue their employers for damages for bodily injuries which are covered by workers' compensation. The fair and sensible contemporaneous interpretation of the law should not be disturbed.

D. The Court should pay no heed to respondents' suggestion that the regulation is entitled to reduced deference because it was drafted "in haste" (Resp. Br. 11-12) and was "squirreled away" amidst "hundreds of AWPA regulations." (*Id.* at 12-13, 32 n.27.) The regulations were drafted under the supervision of Deputy Undersecretary Collyer (assisted by his associate Craig Berrington) and Wage and Hour Administrator Otter. 48 Fed. Reg. 15,805. As the legislative history demonstrates beyond dispute, these men—particularly Berrington—drafted, negotiated and lived with AWPA for 18 months prior to its passage. *1982 Hearings* at 50. The bill was passed in the House in September, 1982, and in the Senate (after little debate and no significant opposition) in December, 1982. Interim regulations were not issued until April 12, 1983. That hardly seems a rushed schedule for the preparation of

regulations by the individuals who wrote the bill and were so familiar with it for so long. And the regulations were hardly voluminous. They covered just 21 pages in the Federal Register (48 Fed. Reg. 15,806-15,827) and did not number in the "hundreds."

Furthermore, Section 500.122(b) was not only not "squirreled away", but it was *clearly stated in the four-page summary to the regulations* (48 Fed. Reg. 15,803):

> The regulations state further that where a State workers' compensation law is applicable and coverage is provided for a migrant or seasonal agricultural worker by the employer, the workers' compensation benefits are the exclusive remedy for loss under this Act in the case of bodily injury or death.

Nobody who even read the brief summary, no less the regulations themselves, could have possibly missed the regulation. It is simply nonsense to suggest, as respondents do, that the Department of Labor somehow slipped this regulation past the concerned parties (including farm labor groups) who commented extensively on other provisions. Everybody concerned knew about the regulation and no one objected because the regulation merely implemented the accepted interpretation of the statute.[7]

---

[7] Respondents assert that "[i]t is impossible to know whether * * * the Department of Labor received any comments objecting to [the regulations] * * * because the comments have, according to the Department, been lost." Resp. Br. 13 n.10; 32 n.27. But in issuing the final text of its regulations, the Department indicated that it received a total of 61 comments on all of the regulations, and that it was "summariz[ing] the substantive comments which were received." 48 Fed. Reg. 36,736. It did *not* mention any comment relating to Section 500.122(b), so the only plausible assumption is that no substantive objections were filed.

Although we question the propriety of respondents' citation of its telephonic investigation (Resp. Br. 13 n.10; 32 n.27), in defense we followed their lead and telephoned former Associate Deputy Undersecretary Craig Berrington, the driving force behind AWPA.

(Footnote continued on following page)

Moreover, respondents' claim that the Department of Labor sneaked this regulation past the concerned parties is also flatly inconsistent with its claim that the private right of action for damages was the "centerpiece" of AWPA and that the regulation greatly impairs the private right of action. If respondents have their way, we must believe at the same time that the regulation dealt a mortal blow to AWPA, and that the numerous farm labor organizations nevertheless did not notice the provision in the regulations even though it was highlighted in the summary. If the regulation was "anathema" to Congress and fatal to the "centerpiece" of the statute, the farm labor groups and members of Congress would have noticed and screamed foul. Yet no protest appears on the record, and no comments on this provision were even mentioned in the rather thorough discussion of the comments received that was published in the Federal Register when the final regulations were issued. The only reasonable explanation is that the supporters of the bill did not object because the regulation was not objectionable.

E. Respondents construe the fact that the Solicitor General has not filed an *amicus* brief in this case as proving that the Department has affirmatively "declined" to defend its regulation. But as even respondents must admit (Resp. Br. 33), we do not know why the government has not filed a brief, and there has certainly been no official or unofficial indication that the Department affirmatively decided not to support its regulation. More importantly, this is *not* a case where the Department's position on an issue must be set out in a brief or other transitory

[7] *continued*
See *1982 Hearings* at 43, 50, 57. Mr. Berrington informed us that indeed there were no objections to Section 500.122(b); that it was understood that the statute would be interpreted as the regulation interpreted it; and that the intent of Section 1841(c) was to encourage farm employers to elect workers' compensation coverage and to encourage states to require such coverage.

document. See, e.g., *Mead Corp.* v. *Tilley*, 109 S. Ct. 2156, 2164 n.11 (1989); *Container Corp.* v. *Franchise Tax Board*, 463 U.S. 159, 195-196 (1983). Even in those cases there is serious doubt as to whether the government's silence should be interpreted to reflect a change in position. *Container Corp.* v. *Franchise Tax Board*, 463 U.S. at 204 (Justice Powell, dissenting). But here the Department of Labor has issued a formal regulation after notice and comment. It has not begun any new rulemaking proceedings or in any way expressed an intent to abandon the regulation. The Department can hardly be regarded as having withdrawn that regulation merely because it did not file a brief in this case. Certainly, the government is not required to file a brief whenever one of its regulations is called into question in a case to which it is not a party.[8]

II. The Pre-1982 Legislative History Is Not Relevant To This Case And Does Not Support Respondents' Position In Any Event

In apparent recognition of the fact that the Department of Labor's interpretation of AWPA would be entitled to deference if only the language and history of that statute were taken into account, respondents throughout their brief invoke the legislative history of the prior statutory structure, FLCRA. Resp. Br. 1-7, 9 n.9, 27-28 & n.20. Through selective patching of phrases out of context, they misquote the Department of Labor spokesman (Deputy Undersecretary Collyer) as characterizing AWPA as merely a revision, clarification and reenactment of FLCRA (*id.*

[8] Respondents seek to contrast the government's role in this case with that it took in *Chevron*, where respondents say the government presented the oral argument for Chevron. Resp. Br. 32 n.26. What respondents neglect to mention is that the United States was a *party* in *Chevron*, which was a consolidation of three cases including *Ruckelshaus, Administrator, Environmental Protection Agency* v. *Natural Resources Defense Council*. See 467 U.S. at 837 n.*.

9 n.9 & 28 n.20) and they argue that AWPA's legislative history includes that of FLCRA. *Id.* at 27-28. Most particularly, they claim that an attempted amendment of FLCRA in 1978 demonstrates that the Department of Labor's interpretation was "anathema to" and "specifically rejected" by Congress. *Id.* at 15, 25.

1. This argument has at least two fatal flaws. First of all, AWPA was not a mere revision or reenactment of FLCRA; instead it repealed FLCRA as a failure and enacted a new law that retained some features of FLCRA, rejected others, and added many new ones of its own. Unlike respondents, we do not need to patch together words out of context to find what Deputy Undersecretary Collyer really said about the bill. He stated his view quite clearly in his prepared testimony (*1982 Hearings* at 45):

> Now, Mr. Chairman, let me describe this consensus bill. *We are proposing a completely new statutory structure.* Our proposal *repeals FLCRA and creates a new law*, the "Migrant and Seasonal Agricultural Workers Protection Act."

Why propose a new statutory structure? Because FLCRA had become a monstrosity and in late 1979, 52 United States Senators joined in a letter to the Department of Labor protesting abusive treatment of farmers under the law. In 1980 a bill passed the Senate that would have effectively repealed (and *not* replaced) FLCRA insofar as it applied to fixed-situs farm employers like the Adams Fruit Company. See *1982 Hearings* at 44-45, 59.

As the *House Report* stated (at 4), "[c]learly a new workable approach and structure are imperative, and [AWPA] achieves that goal." AWPA was enacted "to rectify [the] fundamental problems with [FLCRA]." 126 Cong. Rec. 32,459 (Senator Hatch). FLCRA came to be hated by almost everyone involved; AWPA on the other hand, was a "consensus bill." The legislative history of AWPA does examine the history of FLCRA, but only to

point out that FLCRA's long road to dismal failure had finally come to an end. See 126 Cong. Rec. 26,008-26,009, 32,459, 32,464 (1982); *House Report* at 1-4; *1982 Hearings* at 43-45.

In these circumstances, the legislative history of FLCRA has little relevance to this case. Certainly the rejection of an amendment in 1978 that would have applied primarily to farm labor contractors and not to farm employers—and that was rejected because of the lack of an employment relationship between the contractors and the workers[9]—tells us nothing about what Congress intended in enacting the new law several years later.

2. But even if the 1978 legislative history *were* relevant to AWPA, it hardly amounts to the categorical rejection of the Department of Labor's interpretation that respondents portray. In fact, the 1978 amendment would have done just what Congress expressly did in 1982 as part of AWPA: it would have modified the motor vehicle insurance provision of the law so that the required policies would not be required to cover claims already covered by state workers' compensation law. H.R. 10631, 95th Cong., 2d Sess.; *1978 Hearings* at 3-4, 34. *The 1978 bill*

[9] *See Hearings Before The Subcomm. On Econ. Opportunity Of The House Comm. On Educ. And Labor on H.R. 8232 [and Related Bills]*, 95th Cong., 2d Sess. 56-57 (1978) ("*1978 Hearings*"). Respondents cite other portions of these hearings for the proposition that the Department of Labor opposed the 1978 amendment because workers' compensation benefits were inadequate. Resp. Br. 4-6. But the Department's spokesman (Assistant Secretary Elisburg) clearly demonstrates that the agency's opposition was based on its perception that "the employer-employee relationship may not be established while the agricultural workers are in transit * * *." *1978 Hearings* at 57. Respondents rely primarily on a letter one of Mr. Elisburg's subordinates (Warren D. Landis) sent to a congressman a year before the bill was introduced, but the entire series of correspondence between the Congressman and the Department made it clear that Landis overstated the Department's position particularly as to adequacy of the state benefits. *1978 Hearings* at 5-10.

did not expressly modify in any way the private right of action provision of FLCRA, just as Section 1841(c) does not expressly modify the private right of action provisions of AWPA. Yet everybody understood (and respondents acknowledge) that the modification of the insurance requirement in 1978 was intended to modify the private right of action even though the amendment contained no language to that effect. Similarly, everybody understood that Section 1841(c) of AWPA was intended to restrict the private right of action in 1982. That is why the Department of Labor's regulation making explicit that intent became effective without adverse comment. See n.7, *supra*.

III. Respondents' Position Is Contrary To All Accepted Notions Of How Injured Workers Should Be Compensated

The court of appeals' opinion improperly overturns the reasonable, contemporaneous interpretation of the Department of Labor, the agency Congress entrusted to implement AWPA. In our opening brief, we pointed out the unfortunate consequences that would flow from that court's decision and the fact that it unjustifiably disturbs the historic compromise inherent in workers compensation—and does so in the absence of any real evidence that Congress intended such a result. Many of the arguments respondents make are arguments against the concept of workers' compensation. But the workers' compensation system is well-established and accepted in the United States. It provides medical and wage benefits on a no-fault basis and greatly reduces litigation. There is no reason to believe Congress intended to give migrant and seasonal workers protections beyond those available to other employees. In fact, it is clear that in enacting Section 1841(c) of AWPA, Congress intended to encourage workers' compensation coverage of migrant and seasonal workers.

We make those points in our opening brief, but we could not have made them as well as Professor Arthur Larson, the country's preeminent authority on workers' compensation, did in the latest revision to his treatise (2A A. Larson, THE LAW OF WORKMEN'S COMPENSATION, 27-28 (1989 Supp.):

> The Eleventh Circuit['s decision] * * * ignores the virtually uniform *contra* holding of all the cases * * * in which exclusiveness bar has been applied to a wide assortment of statutorily-created causes of action, both state and federal. The court relies heavily on legislative history said to show that Congress intended migrant workers to have special protection over and above that of other workers. Taking this position was necessary if the court was to distinguish the Supreme Court decision in *United States v. Demko*, 385 U.S. 149 (1966), which held that the Federal Tort Claims Act did not preempt the compensation statute. To hold that it did, said the Supreme Court, one would have to conclude that injured prisoners were given greater protection than other federal employees. It is similarly difficult to believe that Congress meant to create a privileged class, the migrants, with rights superior to all other workers. Surely, it would be enough if migrants were treated just as well as all others. It was the fact that they were not that inspired this legislation. The Eleventh Circuit also relies on the argument that, if the compensation remedy were exclusive, the employer would have little incentive to comply with safety requirements. This is the sort of argument one used to hear fifty years ago against compensation acts generally. It stems from the naive idea that a bad safety record costs the employer nothing. The truth is that, with experience rating, the employer does indeed feel the cost of unsafe practices; indeed, employers with particularly poor records may well be driven out of business. A final problem with the decision is that it raises questions about the nature of preemption itself. Thus, although the court sometimes speaks loosely of preempting the state statute, it

surely cannot mean this, since the effect would be to leave all injured workers without any remedy unless they happened to have a tort cause of action. One can only conclude that the court's idea or preemption is to pick and choose portions of both state and federal statutes, and thus have the best of both worlds. This ignores the most fundamental rationale of workers' compensation, which is that the worker gains the benefits of employer liability without fault as a *quid pro quo* for forgoing tort remedies.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with instructions to dismiss respondent's AWPA claims for damages due to bodily injuries.

Respectfully submitted,

BONITA L. KNEELAND
Counsel of Record
JOHN W. ROBINSON
GEORGE A. VAKA
Fowler, White, Gillen, Boggs, Villareal & Banker, P.A.
501 East Kennedy Boulevard
Suite 1700
Tampa, Florida 33602
(813) 228-7411